SADIAH ISMAIL

v.

ONG SUAN & ANOR

HIGH COURT MALAYA, TEMERLOH
AZHAR MA'AH J
[ORIGINATING SUMMONS NO: 24-137-98]
2 DECEMBER 1998

CIVIL PROCEDURE: *Costs - Order of costs pursuant to damages awarded in respect of injuries sustained due to road accident - Costs based on reduced amount of damages due to finding of contributory negligence - Whether should be based on full quantum of damages*

The plaintiff was awarded on the basis of full liability, general damages amounting to RM94,000 but on a finding of contributory negligence which the Sessions judge apportioned at 50%. The Sessions judge also ordered that the costs payable to the plaintiff be based on the reduced amount instead of the full quantum. In this instance, the plaintiff applied for the said order to be revised and that the plaintiff be given full costs based on the full quantum of damages.

Held:

[1] In *Jag Singh v. Toong Foong Omnibus Co Ltd* and *Khadijah v. Sterling Drug (Malaya) Ltd*, the figures used by the court to determine costs payable to the plaintiffs therein were not the actual amount recoverable and awarded to them but the total damages which would have been recoverable if the claimant had not been at fault.

[1a] Costs come as of right and it is not to be considered as part and parcel of the damages awarded in respect of the injuries themselves, which is subject to a reduction on a finding of contributory negligence.

[Plaintiff entitled to full costs.]

Cases referred to:
Jag Singh v. Toong Foong Omnibus Co, Ltd [1962] 28 MLJ 271 ***(foll)***
Khadijah v. Sterling Drug (Malaya) Ltd [1967] 1 MLJ 278 ***(foll)***

For the plaintiff - Harcharan Singh; M/s Harcharan Singh Randhawa & Partners
For the defendant - Andrew Khoo; M/s Khoo & Siddhu

Reported by Usha Thiagarajah

JUDGMENT

Azhar Ma'ah J:

In the Sessions Court below the plaintiff sued the defendant for damages in respect of injuries, sustained as a result of a road accident. She was awarded on the basis of full liability, general damages amounting to RM94,000 but on a finding of contributory negligence, which the learned trial Sessions Judge apportioned at 50% also ordered that costs payable to the plaintiff be based on the reduced amount instead of full quantum.

Before me now is an originating summons wherein the plaintiff applied for the said order be revised and the plaintiff be given a full costs based on full quantum of damages awarded.

In support of this application, counsel for the applicant cited the case of *Jag Singh v. Toong Foong Omnibus Co., Ltd* [1962] 28 MLJ 271. In that case, the plaintiff, a seven year old school boy was knocked down by the defendant's omnibus. He sustained injuries and sued the bus driver for negligence. Suffian J held that there was contributory negligence by the plaintiff which he assessed at 50%. He thus awarded the plaintiff RM7,890 as general and special damages and half his taxed costs. On appeal against the finding of the trial judge of contributory negligence and against the order depriving him of half his costs, the Court of Appeal held *inter alia* that the learned trial judge was wrong in apportioning the costs as he did, thereby depriving the plaintiff half of his costs.

Counsel for the defendant while conceding to the correctness of the principle laid down in *Jag Singh's* case, argued that the facts of that case should be distinguished from that of the present case. In *Jag Singh* the trial was by a High Court, and costs was awarded at the judge's discretion, while in the present case costs awardable by the lower court must be according to scale, based on the actual amount of damages awarded.

In the case of *Khadijah v. Sterling Drug (Malaya) Ltd* [1967] 1 MLJ 278, the plaintiff brought an action for damages arising from injuries she sustained in an accident and was awarded on the basis of full liability, general damages amounting to $4,000 but on a finding of contributory negligence, which the learned judge apportioned at 50%, the amount of total damages assessed as recoverable was reduced by $2,000. There was an order for costs from which the taxing master assumed that the successful plaintiff was entitled to have her costs taxed on the High Court scale. During taxation the defendant contended that as the plaintiff had recovered only a sum of $2000 her bill of costs should in terms of O. 65 r. 12B be taxed on the Subordinate Court scale.

The plaintiff maintained that as the total award on 100% liability was beyond the jurisdiction of the Subordinate Court the action could not have been brought there.

The High Court, on appeal held that as the full amount recoverable, without deduction was $4000, a sum which was beyond the jurisdiction of the subordinate court to award, this action could not have been brought in that court, therefore the learned Assistant Registrar was right when he decided to tax costs on the High Court scale.

Looking at the above mentioned cases ie, *Jag Singh* and *Khadijah* closely, although they are not directly on point with our present case, there is an underlying principle in them from which a useful clue could be drawn and applied to our case here. It is to be noted that in both these cases the figures used by the court to determine costs payable to the plaintiffs were not the actual amount recoverable and awarded to them but the total damages which would have been recoverable if the claimant had not been at fault. I see no reason why I should depart from this principle as I am of the view that costs, come as of right and it is not to be considered as part and parcel of the damages awardable in respect of the injuries themselves which is subject to reduction on a finding of contributory negligence.

In view of the foregoing, the plaintiff is entitled to his full costs.